



**UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.**

Order 97-12-19

Issued by the Department of Transportation  
on the 12th day of December, 1997

SERVED: December 12, 1997

**1997 U.S.-ARGENTINA ALL-CARGO  
FREQUENCY PROCEEDING**

**Docket OST-97-3139**

**Petition of**

**CHALLENGE AIR CARGO, INC.**

**for reconsideration of Order 97-11-35**

**Dockets OST-97-3139 et al.**

**Petition of**

**FEDERAL EXPRESS CORPORATION**

**for Clarification of Order 97-11-35**

**Dockets OST-97-3139 and  
OST-97-2548**

**Application of**

**FEDERAL EXPRESS CORPORATION**

**for reallocation of operating frequencies pursuant to  
49 U.S.C. § 40109 (U.S.-Argentina All-Cargo  
Frequencies)**

**Dockets OST-97-3139 and  
OST-97-2594<sup>1</sup>**

**ORDER**

<sup>1</sup> Federal Express filed its amendment to its Contingent Application in Docket OST-97-2594. Order 97-11-35 consolidated Docket OST-97-2594 into the new proceeding established by that Order (OST 97-3139); Federal Express's amendment should have been filed in OST 97-3139 and will be consolidated into that proceeding.

## **Summary**

By this order, we grant the petition of Challenge Air Cargo, Inc., for reconsideration of Order 97-11-35 which instituted the *1997 U.S.-Argentina All-Cargo Frequency Proceeding*, and, upon reconsideration, deny its request that we rescind the order or modify the scope of the instituted proceeding. We also grant Federal Express' request that we confirm that it is an applicant for no fewer than three additional frequencies in this proceeding.

## **Petition for Reconsideration**

By Order 97-11-35, the Department instituted the *1997 U.S.-Argentina All-Cargo Frequency Proceeding*, Docket OST-97-3139, to examine U.S. carrier service in the U.S.-Argentina market. We noted the receipt of numerous submissions which indicated a substantial evolution in the position and operations of a number of U.S. carriers with frequency allocations for Argentina all-cargo service from the time we issued their respective authorizations. We further noted that sufficient questions had arisen about actual past use and optimum future use concerning the specific allocations held by Florida West, Arrow, and Challenge to warrant a public interest inquiry under our general powers to review the public interest bases of current awards.

Challenge Air Cargo, Inc. filed a petition for reconsideration of Order 97-11-35. It argues that if the Department is going to review the service needs of the U.S.-Argentina market, it should review all services not just those of some carriers; and that Challenge has had insufficient notice of any deficiencies in its service and has been denied the opportunity to remedy such deficiencies before the Department has subjected its frequencies to reallocation. Based on these factors, Challenge argues that the Department must either rescind its instituting order in its entirety or expand the scope to include a review of all existing services.

Federal Express filed in support to the extent that Challenge urges the Department to reconsider instituting a case before it has first determined whether any currently allocated frequencies are available for reallocation.

Polar Air filed an answer in opposition, arguing that Challenge has had adequate notice of the Department's long-standing policy concerning use of valuable limited-entry international route authority when it initially applied for and received an allocation of U.S.-Argentina frequencies; that contrary to Challenge's statements, Challenge has been specifically on notice regarding the 90-day dormancy condition since February 1997, and of the Department's concern over the potential dormancy of its frequencies in the Department's August 14 Notice. It further argues that the Department fully considered Challenge's arguments, reiterated here, in instituting the *1997 U.S.-Argentina All Cargo Frequency Allocation Proceeding*, and that Challenge will be accorded procedural rights to defend its allocation in the context of the proceeding.

Challenge filed a reply, arguing that Polar has erroneously contended that because Challenge has not conducted two Argentina flights every week, its frequencies should be revoked for dormancy, and that Polar is incorrect in stating that Challenge's procedural rights are protected by the

opportunity to participate in this proceeding.<sup>2</sup> Rather, Challenge argues that the Department's dormancy condition does not provide adequate guidance to carriers regarding the terms of frequency allocations and that Challenge cannot lawfully be placed in the position to recompute based on an unarticulated standard. Thus, Challenge again urges the Department to resolve the dormancy issue before it institutes any proceeding to consider reallocation of U.S.-Argentina all-cargo frequencies.

On December 4, 1997, Southern Air Transport, Inc. filed a late answer in opposition to Challenge's petition.<sup>3</sup> Southern urges the Department to deny Challenge's petition and to continue with the proceeding. It states that the Argentina frequencies awarded to Challenge by Order 95-1-9 are dormant and that, contrary to Challenge's arguments, dormancy is clearly a threshold issue for determination in this proceeding. Southern further argues that Challenge has received adequate notice of the Department's concerns regarding use of its frequencies.

### **Decision**

We have decided to grant Challenge's petition for reconsideration, and upon reconsideration, to deny the relief requested and to maintain fully our decision in Order 97-11-35.

As set forth in Order 97-11-35 and recalled in this order above, we determined, in light of the various submissions regarding service to Argentina, that we needed to review the frequency allocation for certain U.S. carriers operating to Argentina. Challenge has presented no information that would lead us to alter that conclusion.

As to the issues Challenge raises regarding notice, we believe that the notices and orders issued, combined with the procedures established in Order 97-11-35, will provide Challenge, as well as any other interested carriers, ample opportunity to argue its position and present any evidence it may wish to present.<sup>4</sup> Nor are we persuaded that the public interest warrants expanding the scope of this proceeding to include the frequency allocations of other incumbent carriers. Federal Express and Polar Air are using their frequencies fully, and no party has presented any evidence that would question the use by these carriers of their frequency allocations or otherwise warrant our placing those allocations in issue.

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<sup>2</sup> Challenge's reply was accompanied by a motion for leave to file an otherwise unauthorized document. We will grant the motion.

<sup>3</sup> Although Southern's late-filed answer was not accompanied by a motion for leave to file, we have decided to accept it in the interest of ensuring a complete record.

<sup>4</sup> In addition, we continue to believe that we need not make any determination on the dormancy issue at this time. Since we have instituted this proceeding under our general powers to review the public interest bases of the current awards, all carriers will have the opportunity to present argument and facts on the issue of dormancy and whether certain frequencies should be available for reallocation. Nothing in Challenge's petition or any of the related pleadings persuades us otherwise. (Order 97-11-35, fn 12.)

### **Petition for Clarification**

On November 24, 1997, Federal Express filed a petition requesting that the Department clarify and confirm that it recognizes that Federal Express is an applicant for no fewer than three additional U.S.-Argentina frequencies in this proceeding, regardless of whether those three additional frequencies are awarded to Federal Express by transfer or by reallocation of existing authorities, or by a combination of transfer and reallocation. Concurrently, Federal Express amended its application in Docket OST-97-2594 to include a request for three Argentina frequencies, rather than two, in the event that the Joint Frequency Transfer Application in Docket OST-97-2548 is denied in its entirety for any reason.<sup>5</sup>

No answers were received to the petition. We will grant the petition and accept Federal Express' amended application to clarify that Federal Express is an applicant for no fewer than three additional U.S.-Argentina frequencies. No party has opposed Federal Express' request, and we have determined that acceptance of Federal Express' amended application at this early stage of the proceeding will not prejudice any party to the case.

### **Correction to Applicant Evidence**

We note that our instituting order inadvertently contained an incorrect date for applicant carrier traffic forecasts. The correct date for the forecast year under Applicant Evidence is the twelve months ending December 31, 1998, rather than December 31, 1996, as stated. Counsel for each party to this proceeding was orally notified of this change by Department staff on November 25, 1997. There are no changes to the procedural schedule established in Order 97-11-35, and we expect all parties to comply with the procedural schedule established.

ACCORDINGLY,

1. We grant the petition of Challenge Air Cargo, Inc., and upon reconsideration, deny its request that we rescind Order 97-11-35 or expand the scope of the *1997 U.S.-Argentina All-Cargo Frequency Allocation Proceeding*;
2. We grant the petition of Federal Express, and clarify that Federal Express is an applicant for no fewer than three additional U.S.-Argentina frequencies in the *1997 U.S.-Argentina All-Cargo Frequency Allocation Proceeding*;
3. We amend Order 97-11-35, page 8 line 2, to make clear that the forecast year for the applicant traffic forecasts in the proceeding is the twelve months ending December 31, 1998;
4. We grant all motions for leave to file otherwise unauthorized documents; and

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<sup>5</sup> Dockets OST-97-2594 and OST-97-2548 were consolidated into OST 97-3139. The Amendment No. 1 captioned as OST-97-2594 was accompanied by a motion for leave to amend. We will grant the motion.

5. We will serve this order on Challenge Air Cargo, Inc.; Federal Express Corporation; Polar Air Cargo, Inc.; Arrow Air, Inc.; Fine Airlines, Inc.; Florida West International Airways, Inc.; Southern Air Transport, Inc.; the Ambassador of Argentina in Washington DC; and the Department of State (Office of Aviation Negotiations).

By:

**CHARLES A. HUNNICUTT**  
Assistant Secretary for Aviation  
and International Affairs

(SEAL)